NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEVEN MORNINGTHUNDER, Plaintiff/Appellant, v. AUGUSTA RESOURCE CORPORATION; PHELPS DODGE MINING COMPANY; and FREEPORT-MCMORAN COPPER & GOLD, INC., Defendants/Appellees.	2 CA-CV 2008-0008 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20075129

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Steven Morningthunder — Green Valley
In Propria Persona

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Phelps Dodge Mining Co. and Freeport-
McMoRan Copper & Gold, Inc.

P E L A N D E R, Chief Judge.

¶1 Plaintiff/appellant Steven Morningthunder appeals from the trial court's dismissal of his complaint pursuant to Rule 12(b)(6), Ariz. R. Civ. P., for failure to state a claim against defendants/appellees Augusta Resource Corporation (Augusta), Freeport-McMoRan Copper & Gold, Inc. (Freeport), and Phelps Dodge Mining Company (Phelps Dodge). Morningthunder contends the court erred by dismissing his claims against Phelps Dodge and Freeport[1] when they had not answered his complaint or filed a motion to dismiss. He also maintains his complaint adequately stated claims for gross negligence against Phelps Dodge and Freeport and for injunctive relief against Augusta. We affirm.

1. Dismissal of complaint against Phelps Dodge and Freeport

¶2 Morningthunder filed his complaint in September 2007, apparently seeking to raise environmental and water issues related to the operation of the Twin Buttes Mine. Augusta moved to dismiss the complaint for failure to state a claim, requesting alternatively

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[1]In his briefs, Morningthunder only refers to Phelps Dodge in some of his arguments. Because Freeport and Phelps Dodge filed joint notices of appearance in the trial court and on appeal and are represented by the same attorney, we view Morningthunder's arguments as including Freeport when he discusses Phelps Dodge. Similarly, any reference to Phelps Dodge in this decision also includes Freeport.

"that [Morningthunder] be required to provide a more definite statement and comply with the rules of pleading." *See* Ariz. R. Civ. P. 12(b), (e). Phelps Dodge and Freeport filed a joint notice of appearance and moved to extend time to respond to the complaint, which the trial court granted. Two days before their response was due, the court held a hearing on Augusta's motion to dismiss. The court granted the motion, dismissing the complaint "with prejudice as to all defendants."[2]

¶3 On appeal, Morningthunder asserts the trial court could not dismiss Phelps Dodge because it had not filed an answer, moved for dismissal, or otherwise responded to his complaint. He maintains that "such a maneuver can only be considered contrary to the decades of evolution of pretrial procedure." Phelps Dodge responds that no procedural error occurred because it complied with the Arizona Rules of Civil Procedure. Although the procedure the trial court followed is unusual and generally should be avoided, we find no error here.

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[2]The court rescheduled the hearing on Augusta's motion to a half-hour earlier than previously set without notifying Phelps Dodge and Freeport of the change. The minute entry from the hearing states that, after considering the motion papers and oral arguments of Augusta and Morningthunder, the court dismissed the case with prejudice. The minute entry also states that, when counsel for Phelps Dodge later appeared for the hearing, he was "advised of the Court's ruling on this date. IT IS ORDERED that this case is dismissed with prejudice as to all defendants." On appeal, Morningthunder suggests that the dismissal as to Phelps Dodge resulted from "*ex parte*" communications. We disagree because the court had already decided to dismiss the action before counsel for Phelps Dodge arrived and then simply "advised" counsel of its earlier ruling. The record does not suggest that any conversation occurred directly between the court and counsel or that any improper ex parte communication took place. *See San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, ¶ 12, 977 P.2d 790, 795 (1999); *see also* Canon 3(B)(7), Ariz. Code of Jud. Conduct, Ariz. R. Sup. Ct. 81; ER 3.5, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

¶4 "We review an order granting a motion to dismiss for abuse of discretion." *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006). When reviewing a dismissal for failure to state a claim, "we assume as true the facts alleged in the complaint and will not affirm the dismissal unless satisfied as a matter of law that plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, ¶ 4, 954 P.2d 580, 582 (1998); *see also Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, ¶¶ 11-17, 168 P.3d 917, 922-24 (App. 2007).

¶5 Although not cited by the parties, *Acker v. CSO Chevira*, 188 Ariz. 252, 934 P.2d 816 (App. 1997), provides guidance on whether and when a trial court may dismiss a complaint sua sponte under Rule 12, without the defendant's having moved for dismissal. In *Acker*, the trial court dismissed an inmate's *in forma pauperis* civil rights complaint before any defendants had been served. *Id*. at 253, 934 P.2d at 817. Reversing that ruling, Division One of this court "conclude[d] that the trial court lacked express authority to dismiss the complaint on the stated grounds" and had "neither invoked [its inherent] authority [to dismiss an action] nor made any record to support its use of that authority." *Id*. The court "d[id] not hold that an Arizona trial court can never order a sua sponte Rule 12(b)(6) dismissal." *Id*. at 256, 934 P.2d at 820. Rather, it held that, "before the trial court orders such a dismissal," it should follow the procedural safeguards discussed in *Franklin v. Oregon State Welfare Division*, 662 F.2d 1337 (9th Cir. 1981). *Id*. *Franklin* required that the defendants receive service of process and that the trial court notify the plaintiff of

the proposed action and give him an opportunity to file a written opposition.[3] *Franklin*, 662 F.2d at 1341; *see also Wong v. Bell*, 642 F.2d 359, 362 (9th Cir. 1981). Even if no notice is given, however, a court may dismiss an action sua sponte "without notice where the claimant cannot possibly win relief." *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).

¶6 In contrast to *Acker*, the trial court dismissed this action only after service of process had occurred and after Phelps Dodge and Freeport had filed a joint notice of appearance. In addition, the court in *Acker* expressed concern that, because the case was dismissed before any defendants had been served, the plaintiff was the only party on appeal, rendering the appellate process "nonadversarial." *Acker*, 188 Ariz. at 256, 934 P.2d at 820. That concern does not exist here, however, because Phelps Dodge and Freeport were served, appeared below, and are parties to this appeal. Also unlike the situation in *Acker*, Morningthunder filed an opposition to Augusta's motion to dismiss and argued his position at the hearing.

¶7 Although Phelps Dodge and Freeport did not join in Augusta's motion to dismiss, that motion was a broad, global attack on Morningthunder's complaint. If well-taken, as the trial court found it to be, the motion undermined the action in toto. Moreover, Morningthunder had and exercised the opportunity to oppose the dismissal, both orally and in writing. As noted above, a trial court does not err in dismissing all claims sua sponte

[3]Because the Arizona civil procedure rules were adopted from the Federal Rules of Civil Procedure, "we give great weight to the federal interpretations of the rules." *Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971).

when the plaintiff cannot possibly obtain relief. *See Omar*, 813 F.2d at 991; *see also City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, ¶¶ 4, 22, 20 P.3d 590, 592, 597 (App. 2001) (affirming trial court's dismissal even though defendant had not filed motion to dismiss). Because Morningthunder's complaint was "'clearly deficient'" and because the concerns present in *Acker* are absent here, the trial court was not procedurally barred from dismissing the complaint as to all defendants. *Acker*, 188 Ariz. at 256, 934 P.2d at 820, *quoting Franklin*, 662 F.2d at 1341.

2. Claim against Phelps Dodge

¶8 Morningthunder also contends he alleged valid claims against Phelps Dodge. Citing *Findlay v. Lewis*, 171 Ariz. 454, 461, 831 P.2d 830, 837 (App. 1991), *vacated*, 172 Ariz. 343, 837 P.2d 145 (1992), he asks us to liberally view his complaint and his contentions on appeal because he is unrepresented by counsel. Though acknowledging his pro se status, Phelps Dodge maintains that Morningthunder's failure "to allege sufficient facts to support a cognizable claim" is a valid basis for dismissing his complaint.[4] Phelps Dodge also asserts "[t]he allegations in the Complaint are indecipherable because Morningthunder failed to comply with . . . Ariz. R. Civ. P. 8(a) & 10(b)." We agree with

[4]Both Phelps Dodge and Augusta ask us to dismiss the appeal, or alternatively to strike or disregard parts of Morningthunder's opening brief, due to his failure to comply with Rule 13, Ariz. R. Civ. App. P. Generally, we prefer to decide cases on the merits. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966); *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984). Therefore, even though Morningthunder's briefs fall woefully short of complying with the rules, we do not dismiss this appeal. But we disregard any exhibits, arguments, and facts set forth in his briefs that were not presented to or considered by the trial court. *See Crook v. Anderson*, 115 Ariz. 402, 403-04, 565 P.2d 908, 909-10 (App. 1977).

Phelps Dodge. Even when viewed liberally and in the light most favorable to him, *see Wigglesworth v. Maudlin*, 195 Ariz. 432, ¶ 12, 990 P.2d 26, 30 (App. 1999), Morningthunder's complaint does not set forth a cognizable claim.

¶9 Rule 8(a) provides that a complaint must include a statement of the court's jurisdiction, "[a] short and plain statement of the claim showing that the pleader is entitled to relief," and a demand for the type of relief sought. *See also Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, ¶¶ 10, 15, 115 P.3d 124, 127, 128 (App. 2005). Rule 10(b) requires that "[a]ll averments of [the] claim . . . shall be made in numbered paragraphs." The purpose of the pleading requirement "is to avoid technicalities and give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956); *see also Cullen*, 216 Ariz. 509, ¶ 16, 168 P.3d at 923-24.

¶10 In his complaint, Morningthunder alleged Phelps Dodge committed "gross negligence in the custodianship of the Twin Buttes Mine." Gross negligence occurs when a party "acts or fails to act when he knows or has reason to know facts which would lead a reasonable person to realize that his conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result." *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991). Other than asserting gross negligence generally, the complaint alleges neither the elements of such a claim nor, more importantly, any pertinent facts to support the claim. *See Cullen*, 216 Ariz. 509, ¶ 16, 168 P.3d at 923-24 (when complaint does not recite basic facts, "we cannot

see how a defendant would have fair notice of the nature and basis of the claim"). In addition, Morningthunder's complaint does not provide a short and plain statement showing a basis for granting relief or sufficiently put Phelps Dodge on notice of the type of litigation involved. *See* Ariz. R. Civ. P. 8(a); *Mackey*, 81 Ariz. at 115, 301 P.2d at 1027-28. Therefore, the trial court did not err in dismissing Morningthunder's complaint as to Phelps Dodge and Freeport.

3. Claim against Augusta

¶11 Next, Morningthunder maintains the trial court erroneously dismissed his complaint against Augusta because his request that Augusta "be halted in its current preparations to withdraw water from the aquifer" was a valid claim for injunctive relief. In response, Augusta argues, as it did below, that his complaint is "incomprehensible" and "fails to allege any wrongdoing by Augusta whatsoever."[5] As noted above, we consider all

[5]Additionally, all of the appellees contend Morningthunder lacks standing to bring this action. Augusta lists lack of standing as one of the reasons the trial court dismissed the complaint. We note, however, that the court's minute entry ruling does not address standing, and the issue was not raised in Augusta's written motion to dismiss. Generally, we may uphold a trial court's ruling if it is correct on any ground. *See Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 6, 20 P.3d 1158, 1162 (App. 2001). But affirming a ruling on new grounds "may deprive the non-moving party of the opportunity to present facts which are relevant to the new issues, but which were not relevant to the issues raised below." *Rhoads v. Harvey Publ'ns, Inc.*, 131 Ariz. 267, 269, 640 P.2d 198, 200 (App. 1981). Apparently Augusta orally raised the issue of standing at the hearing, but the transcript of the hearing was not formally included in the record on appeal. *See* Ariz. R. Civ. App. P. 11; *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("A party is responsible for making certain the record on appeal contains all transcripts . . . necessary for us to consider the issues raised on appeal."). The parties cite the transcript, and both Phelps Dodge and Morningthunder attached a copy of it as an appendix to their briefs. We decline to consider it, however, because Morningthunder apparently contests its validity,

well-pled factual allegations in the complaint as true and will affirm the dismissal only if Morningthunder would not be entitled to relief under any possible interpretation of the facts set forth in his pleading. *See Cullen*, 216 Ariz. 509, ¶ 12, 168 P.3d at 922-23; *Fid. Sec. Life Ins. Co.*, 191 Ariz. 222, ¶ 4, 954 P.2d at 582.

¶12 Morningthunder's complaint is devoid of the elements required to obtain a preliminary injunction. *See Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990) (preliminary injunction requires showing strong likelihood of success on merits, irreparable injury if relief not granted, balance of hardships favoring plaintiff, and public policy favoring injunction). Nor did he allege facts sufficient to entitle him to injunctive relief. *See Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007) ("Factual allegations must be enough to raise a right of relief above the speculative level . . . .").

¶13 Morningthunder asserts he "tried to establish . . . grounds for the right to injunctive relief through the introduction and explication of the concept of overshoot, carrying capacity, and phantom carrying capacity." But those concepts neither establish a legal ground for relief nor render his factual allegations sufficient to withstand challenge under Rule 12(b)(6). And, as Augusta points out, Morningthunder failed to comply with Rule 65(a) and (e), Ariz. R. Civ. P., which require notice and posting of a bond when a party seeks a preliminary injunction. On appeal, Morningthunder acknowledges that he avoided

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stating—albeit ambiguously—that it "has been corrected to the actual words spoken." And, even if the standing issue were not waived, we do not need to address it because we affirm the trial court's ruling on other grounds.

using the word "injunction" in his complaint because otherwise he would "have [had] to post a substantial bond, which [he] thought would likely have been beyond [his] financial means." *See* Ariz. R. Civ. P. 65(e). Even if Morningthunder had included the word "injunction" in his pleading, his complaint does not otherwise allege sufficient facts to support a claim for injunctive relief in any event. *See* Ariz. R. Civ. P. 8(a). Therefore, the trial court did not err in ruling that Morningthunder's complaint failed to state a cognizable claim for relief against Augusta.

Disposition

¶14 The trial court's dismissal of the complaint with prejudice is affirmed. In our discretion, we deny Augusta's request for an award of attorney fees on appeal pursuant to A.R.S. § 12-349 and Rule 11, Ariz. R. Civ. P.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge